Supreme Court, U.S.
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No. 93 - 1058

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOSEPH M. BENNETT, Petitioner

-Vs-

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONERS
REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Should the government be allowed to obtain success in their convictions with trickery and deceit rather than through an honest use of the procedure given to them by the law?

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431 U.S. 63,76 (1977)
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913 F.2d 839, 845 (10th Cir. 1990)

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment V.

OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

On July 8th, 1993, the United States Court of Appeals for the Tenth Circuit affirmed the Petitioners May 18th, 1992 sentencing for kidnapping conspiracy, in violation of 18 U.S.C. sec. 371. This conviction was a result of a plea bargain arrived at on March 2nd, 1992.

On August 12th, 1993, the United States Court of Appeals for the Tenth Circuit denied a Petition for Rehearing.

On November 11th, 1993, the Petitioner sent his Petition for Writ of Certiorari to this Court. However, it violated format and page size rules. It was returned to the Petitioner on November 22nd, revised and then resubmitted on December 27, 1993.

STATEMENT OF JURISDICTION

Petitioner, Joseph M. Bennett, moves this Honorable Court for a Writ of Certiorari and review of the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-titled cause on July 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. sec.1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides in relevant part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

REASONS FOR GRANTING WRIT

The Government should never be allowed to obtain successful convictions with trickery and deceit rather than through an honest use of the procedure given to them by the law.

On November 11th, 1993, the Petitioner sent his brief to this Court. The Government asserts that the Petitioners brief was out of time under this Court's Rule 13. **See** Government Brief in Opposition, p.1. Rule 29.2 covers filing procedure. It specifies documents must bear a postmark showing a mailing date on or before the last date allowed for filing. The Petitioners brief was postmarked November 11th, with the final filing date being November 12th. After a filing date extension the Government brief was due March 9th. Prior awareness of Rule 29.2 is shown by the March 9th postmark date of the Government's mailing.

The Government acknowledges the Appellate Court's order and judgment contained two factual errors, but claims the Petitioner did not show this affected the Court's decision. Neither the Petitioner or the Government was present when the judgment was entered. Only the judgment itself is available. It shows the Court believed the Petitioner tried to withdraw his plea three days after entering it. This misconception would have led the Court to conclude the Petitioner was trying to manipulate the procedure. Worse, the judgment shows the Court believed the Petitioner had been allowed a hearing. This would have easily led to a conclusion that because the District Court had complied with the necessary procedure by allowing a hearing, the plea withdrawal motion had already been found to be invalid.

Just as important, and completely aside from getting the facts wrong, one of these mistaken facts was taken directly from the Government's brief. This suggests the Appellate Court did not go far past a reading of the Government brief before entering it's order. By itself this indicates the Petitioner's appeal did not receive an objective hearing because the truth was easily available in both the record and the Petitioners briefs. The Government asserts

that "Neither the timing of the Petitioner's motion to withdraw his guilty plea nor the District Court's decision to deny the motion without a hearing is relevant ...". This is nothing more than a technical argument without any basis in logic. **See** Government Brief in Opposition, p10.

The Government then writes, "Finally, contrary to petitioner's assertion (Pet. 41-44), the district court was not obligated to hold a hearing on his motion to withdraw his guilty plea, for the simple reason that the motion did not include any "specific factual allegations" (**Blackledge v. Allison**, 431 U.S. 63, 76 (1977)) that would establish a basis for allowing him to withdraw his plea". See Government Brief in Opposition, p. 9.

The Petitioner is puzzled by this claim. In **Blackledge v. Allison**, the Defendant attempted to withdraw his plea **after** sentencing. Surely by this point in these proceedings the Government knows that the standard for allowing pre-sentence plea withdrawals is more liberal than that used for allowing post-sentence withdrawals. **United States v. Rhodes**, 913 F.2d 839, 845 (10th Cir. 1990).

The Government next argues "In any event, the Court effectively gave Petitioner an oral hearing when it permitted

him to renew the motion at the sentencing hearing, where Petitioners attorney and the Court discussed the question at length." **See** Government Brief in Opposition P. 9. What is the meaning of this word "hearing"? Websters Dictionary of the American Language says "a court appearance before a judge or court referee, other than a formal trial before which evidence is presented, testimony is given, etc.". Using this definition it follows that if procedure specifically requires the Court to schedule a hearing and the Court refuses then the Petitioner has been denied a hearing. **See** Petitioners brief pp. 25-28, 40-44. Now - the Petitioner's attorney did attempt to talk the Judge into listening to the Petitioner's side of the story, but the Judge refused. The short conversation between the Petitioner's attorney and the Judge can hardly be considered a "discussion at length", and most certainly the Government's claim this was a "hearing" is incorrect. **See** Government Brief in Opposition p.9.

The record clearly shows the Petitioner was not allowed a hearing. Any discussion now comes after this fact, and so does not have the benefit of the procedure and testimony that the hearing would have provided. The Governments argument is nothing less than a claim the

Petitioner should not have been allowed a hearing because he could not have proven a plea agreement violation anyway. This idea, if taken to it's logical conclusion, would eliminate trials. In other words - why bother with the trouble and expense of a trial? If the Government decides that a Defendant has no hope of proving his innocence, he should go directly to jail.

Although Ellen Carver has received the attention, the truth is that at the time the Petitioner moved to withdraw his plea he had two other witnesses willing to testify. This is described in the Petitioner's Appellate brief, Appellate Reply brief as well as in the brief prepared for this Court. **See** Petitioner's brief, pp.24-25. Now the Petitioner filed his plea withdrawal motion on May 7th, 1992. Ellen Carver's statement was prepared on May 11th. A hearing was expected, and appointments were being arranged for preparation of the remaining witness statements. One of these statements was to be from Nicole's maternal aunt.

Nicole's aunt would have testified that on March 2, 1992, she was in Denver, expecting to be called as a Defense witness. Two weeks earlier she discovered her younger sister, Debra, was now in Utah, and again under

investigation for child abuse. She is now and has for some time been very concerned for the safety of her niece, and wanted to stay in Denver a few days in an attempt to help Nicole. This is directly related a motion she had entered in an Illinois court asking for Nicole's protection. This occurred in December of 1989, and four days of hearings resulted in findings of both child abuse and neglect against the Dodsons. But the Illinois court could only issue a finding, prosecution had to be in Denver because the abuse occurred there. The Illinois court had to give Nicole back to the Dodsons, but was able to attach stipulations including drug counseling and visitation for Nicole's natural father. She would have testified that shortly after the court gave Nicole back to her sister, a visitation exchange resulted in the Chicago Police issuing two still outstanding battery warrants for Richard Dodson. The Police report says Dodson assaulted both Nicole's paternal grandmother and grandfather. She would have testified that the Dodsons left Illinois immediately after this assault, taking Nicole. She would have testified that she believed something must be done for Nicole now, while it was known where Nicole was. She would have testified the Petitioner assured her after his plea agreement the FBI would no longer be

saying Nicole had not been abused, and the U.S. Attorney had agreed to help with Nicole's investigation. Because of the Illinois court finding she was very certain the Denver police would be interested in helping Nicole.

She would have further testified that she went to the Denver Police Station on March 2nd, and spoke with Sgt. Padilla. She provided him with background information and statements from various abuse witnesses. She would have testified that he appeared interested, taking some notes on occasion, and listening to what she had to say. She would have testified that Sgt. Padilla told her he would investigate. He would talk to both U.S. Attorney James Allison, interview the people she had told him about, and then present the case to Kara Jenner, the District Attorney. Kara Jenner would then make the final decision. He said he would get back to her. She would have testified that sometime later, she heard that the Denver Police had made no effort to interview any witnesses. Concerned, she called Sgt. Padilla, asking him how the investigation was progressing and who he had talked with. Sgt. Padilla said he was not allowed to divulge that information. She would have testified that Sgt. Padilla quickly

brushed her off, and she never heard from him again. **See** Petitioner's brief, pp. 15-17,22,23.

The Petitioner had available a witness who had also been a defense witness at the Petitioner's trial. He name was Joseph Vega. He would have testified that he had been Richard Dodson's best friend for a number of years. **See** Petitioners brief, pp.11-13, exhibit E, pp.74-84. Before leaving Denver after the plea agreement the Petitioner met Joseph Vega and told him the Denver Police were doing an investigation. He would be an important witness and he should make sure he met with Sgt. Padilla at the Denver Police Department. Joseph Vega agreed. Later the Petitioner called Mr. Vega and was told that Sgt. Padilla did not want to talk with him. Joseph Vega would have testified that he had tried more than a few times to make an appointment, but the Police did not wish to talk with him and would not return his calls.

But none of these witnesses were ever heard. On May 13th the Judge issued a minute order denying the motion. Ellen Carver's presence at the May 18th sentencing hearing was nothing more than an unsuccessful last minute attempt to talk the Judge into hearing the Petitioner's side of

the story. Distance, a shortage of time, and the fact that no hearing was called prevented calling the other two witnesses. The Petitioner and his attorney considered Ellen Carver important precisely because she was not a party in the proceedings. This Court should notice and keep in mind that the Government is not saying Ellen Carver is not telling the truth. Rather, the Government is claiming statements made to her were not important because the plea agreement imposed "no obligation" to discuss the case with her.

The Government's position appears surprisingly similar to that of many criminal defendants, who after being caught, say - But can you prove it? The freedom to take this position is important to the system, to protect the innocent of course, so the Petitioner will only answer - Yes, it can be proven, and by reference to the record. No single fact taken by itself is conclusive, but together they have a cumulative force.

The Government recites a list of technical reasons to explain why Ellen Carver's testimony was not heard. The record shows none of these are correct. The truth is the District Judge did not believe the charges fit the circumstances of the case, and said this on at least one occasion during the trial. Also, after the Petitioners trial the

Judge said that listening to the defense witnesses describe the child abuse had been difficult for her. She had children and grandchildren of her own, and she did not want to have sit through these witnesses again. She then ordered the U.S. Attorney, and the Petitioners attorney to work something out. Then, Friday, February 28th, three days before the Petitioners trial was to begin, the Judge allowed a Government motion to suppress the Illinois child abuse finding. During the hearing that day, the Petitioner's attorney told the Judge she had "torn the heart" from his case. This Government motion had been before the Court for some time. The Petitioner's attorney believed the ruling did not have good legal foundation, and told the Petitioner the judge was trying to force a plea bargain. Then, at the March 2, 1992 change of plea hearing the judge said, "I must admit, Mr. Bennett, that I have pushed both the Government and your attorney a little bit to see if they could reach an agreement, because it seemed to me that it was just extremely sensible. For you to take a chance to go to trial and have a jury convict you, which would put me in a position of sending you to a Federal prison, which was not at all comfortable for me, nor was it comfortable to do anything

else, because there were really problems with whether you had, in fact violated the law." **See** Petitioners brief, Ex. F pp. 86-87.

The District Judge made her position known. Even if the Government had been truthful the Petitioner believes the Judge would have argued that he should be held to the agreement. Any idea that the Court refused to hear Ellen Carver's testimony for various other reasons is completely off the point. The record shows a judge clearly inclined toward rejecting any plea withdrawal attempt. The Petitioners motion was disposed of by way of a minute order, before the Court even knew Ellen Carver existed, and then summarily dismissed again when it was requested that Ellen Carver be allowed to talk.

If the Government is free to make statements to Ellen Carver stating it's belief that Nicole had not been abused because if had "no obligation" to talk with her, then exactly what was the Government's obligation? The District Judge and the Government both heard the same evidence, and at the end of the trial the Judge made a statement that it appeared to her to be a good case of child abuse. As the result of the Government's failure to keep a previous

agreement the Circuit judge in Illinois heard only a fraction of the testimony heard in Denver (only one witness, Barbara Boyd testified both in Illinois and Denver) and he issued a finding of both child abuse and neglect, and then did everything within his power to help Nicole.

Perhaps the Government cannot imagine what child abuse is or the effect it can have on a little kid. The record shows Nicole was under a state of unending torture. She was carried around by her hair, she always had bruises, black eyes and bumps on the head. Dodson could not be near her without hitting her, or spitting at her. She was made to eat dog food. She was made to drink Dodson's spit from pop cans, and he would spit in her food. She was never referred to as Nicole, only "bitch" or "little bitch". If she had the nerve to cry she would be hit again or as one witness testified have a dirty sock shoved into her mouth. Dodson joked that this was good training because he would have the "little bitch" working the streets when she became older. At various times Nicole would tremble for long periods of time. Neighbors said that on many occasions they heard gunshots coming from the house. A witness testified that Nicole's dog

was shot while Nicole was present and left laying for days in the house.

These stories made their way back to Illinois a few details at a time. They had a powerful effect on not only the Petitioner, but on everybody involved with Nicole's care before Dodson took her. In any case, ideas that Nicole was not abused, elaborate nationwide kidnapping conspiracy rings and interesting love triangle theories have no place in this case.

The record shows the Government's theories were arrived at shortly after the investigation began. In fact, the first time FBI Agent Powell talked with the Dodsons he was assured that Nicole had never been abused, ever. Proof that the Government bought this bill of goods is contained in the record. Before the Petitioner's trial the Government tried to introduce testimony of FBI agent Powell. He would have testified the Dodsons had assured him they had never hurt Nicole. Further, he would testify that during all his visits he had never seen Rick hurt Nicole, or seen any signs that Nicole had ever been hurt by Rick. The Government also entered a motion asking for the Illinois abuse finding to be suppressed.

When the Federal Government first came into Nicole's situation it was very much like the arrival of an 800 pound gorilla. The gorilla may appear to be docile, but you quickly learn what he is capable of the first time you come close to his bananas. The bananas are of course the Government theories, and the lesson was learned during the Illinois child abuse hearings. **See** Petitioners brief pp. 29-31. After these hearings it was clear the Illinois Court could go no further. It was also clear that if the Illinois child abuse finding was presented to the Denver Police they would first contact the Justice Department. What the Justice Department would say was obvious, the result would be nothing for Nicole. This child abuse finding was seen as Nicole's best and very likely only chance. It could not be wasted or gambled with. Therefore, the only option was to wait until the Government finished with whatever it thought should be done.

That date should have been March 2, 1992. During the hearings that day the U.S. Attorney made promises. The transcript shows; "If there are witnesses that need to be talked to ... I'll be happy to do it personally", "... there will continue to be a free flow of information...", "if he has any special requests that they want me to interview someone, I'll

be happy to do it." "But if there is anything I can do to facilitate an investigation, talking to folks, I'll be happy to co-operate and do that." **See** Petitioner's brief, ex. F, pp.94-96.

It is a fact, and not contested by the Government, that Debra's sister went to the Denver Police Station, and met with Sgt. Padilla. He told her he would talk with the U.S. Attorney and Agent Powell. In addition he told her he would interview the witnesses. **See** Petitioner's brief, p.22, p.37.

It is a fact, and not contested by the Government, that the Petitioner personally made the Denver Police aware of the U.S. Attorney's promises only two days afterward. **See** Petitioner's brief, p.23.

It is a fact, and not contested by the Government, that the Denver Police interviewed no witnesses other than the people who came to the police station with the Petitioner. **See** Petitioner's brief, pp.23,37.

It is a fact, not contested by the Government, and further verified by the U.S. Attorney's cross-examination of a defense witness at trial, that the U.S. Attorney was fully aware Nicole's custody had long since been released to the Dodsons. Therefore, anything mailed to Illinois could not

possibly help Nicole. **See** Petitioner's brief, pp. 34-36, exhibit E pp. 65-66.

Further facts, not contested by the Government are: The Denver District Attorney, Kyra Jenner, despite the Illinois court finding, without talking to any witnesses, and without having the police talk to witnesses, decided there was insufficient evidence to prove even a misdemeanor child abuse charge. Then, shortly afterward, Kyra Jenner went to work for the U.S. Attorney's office. Her new job placed her under the supervision of the U.S. Attorney who made these plea agreement promises. **See** Petitioner's brief pp. 23,37.

CONCLUSION

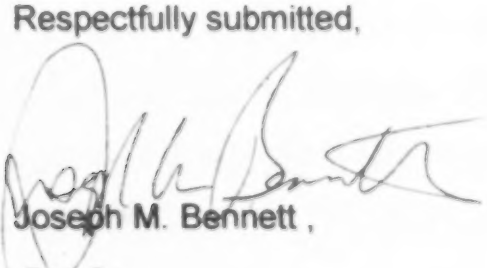
This plea dispute is about the willful destruction of the only hope Nicole is ever likely to have of receiving legal help. This was done for no reason other than childish emotion. A desire not to let the Petitioner "win", as the Government saw it. The Government's actions were in direct violation of both the letter and the essence of the plea agreement. The Government claims Ellen Carver is not important - not because she is not telling the truth, but rather because the

plea agreement imposed "no obligation" to talk with her. This is total nonsense, and completely misses the point.

The Government's obligation was clear. At the plea agreement the Government agreed to finally accept the responsibility they assumed as Nicole's self described "rescuers". These promises should have been an important turning point in Nicole's life, and not because the Government was expected to go much out of its way to help. The promises were important only because they showed that the Government finally recognized it's obligation was to help Nicole. If pride would not allow them to actually help, just remaining silent would have been fine.

The facts clearly show that the Government violated this promise, and it's obligation to the plea agreement. The Petitioner respectfully requests that this Court grant his petition for Writ of Certiorari.

Respectfully submitted,



Joseph M. Bennett ,

Pro Se

CERTIFICATE OF MAILING

I certify that I have served the foregoing PETITIONERS REPLY TO BRIEF IN OPPOSITION upon the other parties herein by depositing true copies thereof in the United States mail, postage prepaid, this 22nd day of March, 1994, addressed to the following:

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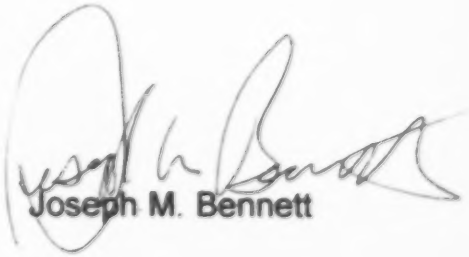

Joseph M. Bennett